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No. 90-1444

In The

Supreme Court of the United States

October Term, 1990

THE STATE OF TEXAS,

Petitioner,

vs.

CARY WAYNE COX,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals For The Second Court Of Appeals District Of Texas

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY TO THE BRIEF IN OPPOSITION 1

I. THE DECISION BELOW INVOLVES A FEDERAL QUESTION: THE PROPER INTERPRETATION OF *JACKSON V. VIRGINIA'S* RATIONAL FACT-FINDER TEST 1

A. Respondent's position in this Court conflicts with the position he took in the Texas Court of Appeals 2

B. The decision below reflects that it is based on the rational fact-finder test of *Jackson v. Virginia* and the reasonable-hypothesis-of-innocence construct which the Texas Court of Criminal Appeals says may be used to apply the *Jackson* test 4

II. RESPONDENT'S FACTUAL ANALYSIS REFLECTS THE USE OF THE REASONABLE-HYPOTHESIS CONSTRUCT 7

TABLE OF AUTHORITIES

Page

CASES

Butler v. State, 769 S.W.2d 234 (Tex. Crim. App. 1989) 3, 4, 5

Carlsen v. State, 654 S.W.2d 444 (Tex. Crim. App. 1983) 3, 4, 5

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) ..... *passim*

Willis v. State, 785 S.W.2d 378 (Tex. Crim. App. 1989), *cert. denied*, 111 S.Ct. 279 (1990) 3

Wilson v. State, 654 S.W.2d 465 (Tex. Crim. App. 1983) 4

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

I. THE DECISION BELOW INVOLVES A FEDERAL QUESTION: THE PROPER INTERPRETATION OF *JACKSON V. VIRGINIA*'S RATIONAL FACT-FINDER TEST.

Respondent takes the position that the lower court's resolution of his sufficiency claim involved no federal

question. His argument appears two-fold. First, he claims that a "passing reference" to *Jackson v. Virginia*[1] in the opinion does not mean that the court was applying a federal sufficiency test. Second, he argues that the lower court did not actually apply the challenged "outstanding reasonable hypothesis of innocence" construct even though the court identified that theory as part of the law governing appellate review of the sufficiency of the evidence. Brief in Opposition at 2-5.

A. RESPONDENT'S POSITION IN THIS COURT CONFLICTS WITH THE POSITION HE TOOK IN THE TEXAS COURT OF APPEALS.

We quote from the introductory paragraph of Respondent's argument in the Court of Appeals, where he set out the applicable law:

> **The standard of review for challenges to sufficiency claims is whether, viewed in the light most favorable to the judgment, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.** ***Jackson v. Virginia,*** **443 U.S. 307,** 318-19 (1974) [sic]; *Carlsen v. State,* 654 S.W.2d 444, 448 (Tex. Cr. App. 1983) (Opinion on Reh'g). The identical standard is applied to sufficiency challenges involving circumstantial evidence cases. *Carlsen,* 654 S.W.2d at 449. **In assessing this standard, if there is a reasonable hypothesis other than guilt of the accused, then it cannot be said that the guilt has been shown beyond a reasonable doubt.** ***Butler v. State,*** ___ S.W.2d

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[1] *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

> ___ (Tex. Cr. App. No. 69,734 delivered April 5, 1989); ***Carlsen,*** 654 S.W.2d at 450 (McCormick, J. concurring).

Respondent's brief in Ct.App. at 8 (emphasis added), quoting from *Willis v. State,* 785 S.W.2d 378, 380 (Tex. Crim. App. 1989), *cert. denied,* 111 S.Ct. 279 (1990).

Respondent thus acknowledged in the lower court that *Jackson v. Virginia* contained the test governing sufficiency reviews in Texas courts. He expressly drew the court's attention to the related reasonable-hypothesis construct, presumably because be thought it applied to his case, even citing the *Butler* and *Carlsen* decisions which the State has shown are at the heart of the Texas courts' misinterpretation of *Jackson v. Virginia.*[2] See petition at 7-9.

Now, when reliance on those authorities is to his disadvantage, Respondent asserts that the lower court was not really applying a federal sufficiency test and that in any event the reasonable-hypothesis construct had nothing to do with the lower court's resolution of his sufficiency claim. Respondent's change in position is sufficient reason for the Court to ignore those arguments.

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[2] *Carlsen v. State,* 654 S.W.2d 444, 448-49 (Tex. Crim. App. 1983); *Butler v. State,* 769 S.W.2d 234 (Tex. Crim. App. 1989).

B. THE DECISION BELOW REFLECTS THAT IT IS BASED ON THE RATIONAL FACT-FINDER TEST OF *JACKSON V. VIRGINIA* AND THE REASONABLE-HYPOTHESIS-OF-INNOCENCE CONSTRUCT WHICH THE TEXAS COURT OF CRIMINAL APPEALS SAYS MAY BE USED TO APPLY THE *JACKSON* TEST.

The State explained at pages 7-9 of the petition that the Texas Court of Criminal Appeals adopted *Jackson v. Virginia*'s rational fact-finder test as ***the*** standard for reviewing the sufficiency of the evidence to support a criminal conviction. *E.g., Wilson v. State*, 654 S.W.2d 465, 471-72 (Tex. Crim. App. 1983); *Carlsen v. State*, 654 S.W.2d 444, 448-49 (Tex. Crim. App. 1983); *Butler v. State*, 769 S.W.2d 234, 238-39 (Tex. Crim. App. 1989).

The court below, in reciting the standard it must use in Respondent's case, first set out what is in fact the *Jackson v. Virginia* test (albeit by paraphrase), then provided a pinpoint citation to the exact pages in *Wilson v. State*, supra, and other decisions in which the Court of Criminal Appeals explicitly embraced the *Jackson* test, and ultimately quoted directly from *Jackson* itself to explain the efficacy of that standard of review. Opinion, appendix to the petition at A-2.

In light of these facts and Respondent's own assertions in his brief below that *Jackson v. Virginia* governed the review of his sufficiency claim, Respondent cannot successfully argue that the decision of the Court of Appeals does not involve the sufficiency test of *Jackson*.

As for Respondent's suggestion that the reasonable-hypothesis construct is a subsidiary state-law standard, we reiterate that the Court of Criminal Appeals has

repeatedly held that *Jackson v. Virginia* sets out the ultimate test for evidentiary sufficiency and that the construct is a tool **"for applying" the *Jackson* test.** *Carlsen v. State*, 654 S.W.2d at 449-50; *Butler v. State*, 769 S.W.2d at 238-39 & n.1. Thus, the challenged decisions rest by their own terms on federal law, not on an adequate and independent state ground. This issue was addressed in detail at pages 14-15 of the petition, and Respondent has offered nothing to undermine the State's analysis. The Court has jurisdiction over the question raised by this petition.

This Court should also reject Respondent's suggestion that the lower court did not actually apply the reasonable-hypothesis construct during its sufficiency review. Both Respondent and the Court of Appeals identified the construct as bearing on the sufficiency review when they set out the law which applied to Respondent's claim. Lawyers and judges usually do not so carefully set out such law unless they believe it must be applied to the case before them.

More important, application of the reasonable-hypothesis-of-innocence construct is the only way to explain the reversal in Respondent's case. For the Court of Appeals to reverse under a proper application of *Jackson v. Virginia*, that court would have been required to find that *no* rational trier of fact could have concluded beyond a reasonable doubt that Respondent was intoxicated at the time of the fatal wreck. However, the opinion below never states that no rational trier of fact could have so found, and moreover, such a conclusion would itself have been irrational in light of the evidence that Respondent:

- drank beer throughout the evening at a keg party;
- acted during the party in a manner consistent with previous drunken behavior;
- refused to go to the aid of his stricken companion because he feared the police would arrest him;
- smelled strongly of alcohol at the scene of the wreck;
- and had an alcohol concentration almost twice the legal limit less than two hours later.

See petition at 3-4, 15-16.

This evidence is very incriminating and undoubtedly sufficient for some juries to convict, though the State would concede that at least some juries might also rationally acquit, depending on the weight they accorded these facts. Since a jury could rationally either convict or acquit, the Court of Appeals' attempt to downplay the impact of the evidence demonstrates its use of the reasonable-hypothesis construct. In effect, the appellate court was attempting to show how a jury might have gone about acquitting Respondent, not how the jury could have convicted him. For these reasons, it is clear that the Court of Appeals actually applied the reasonable-hypothesis construct which it had earlier identified as part of the applicable legal standard.[3]

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[3] This Court would have jurisdiction even if the lower court had not used the reasonable-hypothesis construct but simply made a gross error in applying the basic test of *Jackson v. Virginia*, though we recognize the Court seldom grants review to correct a mistake in the application of settled law to the facts.

II. RESPONDENT'S FACTUAL ANALYSIS REFLECTS THE USE OF THE REASONABLE-HYPOTHESIS CONSTRUCT.

At pages 5-8 of the petition, Respondent attempts to convince the Court that the evidence would be insufficient even under the true test of *Jackson v. Virginia*. However, like the court below, Respondent puts the reasonable-hypothesis construct to work by focusing on the absence of certain facts or the ways in which certain evidence could have been discounted by the jury. For example, he notes that witnesses did not say that Respondent was staggering or slurring his speech and that none of those witnesses rendered an opinion that Respondent was intoxicated. The question under *Jackson*, though, is whether the evidence that was presented could rationally support the verdict. For the reasons stated at pages 15-16 of the petition, the evidence was more than adequate under the *Jackson* test.

Indeed, the jury could have easily rejected the arguments Respondent now makes. For example, witnesses who had seen Respondent at the party were mostly his friends, and the jury could have decided they would shade their testimony in his favor, especially if asked to give an outright opinion on intoxication. In addition, the physical symptoms which could be observed at the scene of the wreck would for the most part have been consistent with shock or a concussion resulting from the accident and thus not particularly probative on intoxication. The critical evidence would have been Respondent's conduct at the party, the alcohol on his breath at the scene, his statements showing a consciousness of guilt, and his high blood-alcohol level.

Respondent's statement that the jury was not given an instruction on the meaning of a 0.19 alcohol concentration is irrelevant since the jury twice heard from experts that the legal limit in Texas was 0.10. R. V – 309-10, 329.

Similarly, Respondent's assertion that the language on the blood-test form is "never" evidence of intoxication and is only a prerequisite to taking a specimen ignores what happened in this case. Such a document normally is viewed only by a judge when ruling on the admissibility of the test result, but here the document was admitted into evidence before the jury *without restriction*. As a result, the jury was entitled to give the form's recitations the weight to which the jurors thought they were entitled.

Respondent also argues that the recitations were meaningless since the officer acknowledged signing the "wrong" form. What the officer admitted was that he mistakenly signed one form that dealt with a suspect's refusal to consent to testing although Respondent actually agreed to the test; the officer did not recant the truth of the other recitations. R. IV – 227-29. In any event, the trial judge admitted two separate forms that contain essentially the same recitations concerning the officer's belief that Respondent was intoxicated. R. VIII – 20 (State's exhibit 25), 22 (State's exhibit 27), both admitted at R. IV – 220-21. For this reason as well, the jury could have decided that it did not matter that the officer had mistakenly signed one of the forms.

Respondent's quibbles over the evidence demonstrate that he asks this Court, as he asked the court below, to canvass the evidence to see whether the jury could rationally have acquitted him, not whether the jury could

rationally have found him guilty. That approach requests the reviewing court to substitute its weighing of the evidence for the rational weighing which the jury undertook. In short, Respondent asks this Court to use the reasonable-hypothesis construct that was so helpful to him in the court below. This is precisely why the Court should grant review and compel the Texas court to apply the true *Jackson* test.

Respectfully submitted,

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